CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Supreme Court, U.S.
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No. 05-19

IN THE

Supreme Court of the United States

Michael L. Bernback,

Petitioner,

v.

Thomas Greco, Individually and as President of Harvey's Lake Amphitheater, Inc.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

In his brief in opposition, respondent notably does not dispute the petition for certiorari's showing that the question presented merits this Court's review. He does not dispute that the courts of appeals are squarely divided over whether interest on an award of attorney's fees accrues from the entry of the judgment establishing the *right* to fees (the holding of six circuits) or, alternatively, from the entry of a later order fixing the *amount* of fees (the holding of three circuits, including the Third Circuit here). See Pet. 2-3. Nor does he doubt that the conflict among the courts of appeals is longstanding and intractable, or that the question is important. See *id.* 3-6. Indeed, respondent does not even dispute that the minority rule adopted by the Third Circuit is wrong on the merits. As the petition demonstrated, both the text and purpose of Section 1961 support the majority rule. See *id.* 8. This Court's intervention is plainly warranted, given that the issue arises in almost every case in which attorney's fees are awarded, has a significant financial consequence to those cases, and generates substantial and unnecessary litigation. Only this Court can bring uniformity to federal law on this recurring question.

Respondent's only argument against review is that this case is supposedly a bad vehicle to decide the question presented. In fact, this is an ideal vehicle: the question was the only issue decided below, and neither of the lower courts doubted for a moment that it was squarely presented here. Respondent claims that, contrary to the understanding of the lower courts, petitioner would not prevail even under the majority rule because – according to respondent – petitioner's right to the attorney's fees was in doubt at the time that the district court entered a judgment in petitioner's favor in the amount of $225,000 on a jury verdict. Because respondent's lone argument against certiorari mischaracterizes not only the majority rule under which petitioner would prevail, but also the facts of this case, certiorari should be granted.

1. Respondent contends that this case is an "inappropriate vehicle for consideration of the question presented," BIO 3, because petitioner's right to an award of attorney's fees was not recognized at the time of the jury verdict itself, but instead was announced when the district court granted petitioner's motion for fees. See *id.* 3, 5. However, as petitioner has previously explained, see Pet. 7 n.4, the majority rule is that interest begins to accrue with a judgment that "unconditionally entitle[s]" a party to recover fees, regardless whether that judgment actually mentions attorney's fees. Interest runs from the date the right to attorney's fees *arises*, as opposed to the date that an entitlement to attorney's fees is *announced*. See, *e.g.*, *Associated General Contractors of Ohio, Inc.* v. *Drabik*, 250 F.3d 482, 494 (CA6 2001) ("[A]n analysis of the language of § 1961(a) leads to the conclusion that a 'money judgment' is the judgment that unconditionally entitles the prevailing party to reasonable attorney fees."); *Copper Liquor, Inc.* v. *Adolph Coors Co.*, 701 F.2d 542, 544 (CA5 1983) (en banc) ("The relevant judgment for purposes of determining when interest begins to run is the judgment establishing the right to fees or costs, as the case may be."), overruled on other grounds by *Int'l Woodworkers of America* v. *Champion International Corp.*, 790 F.2d 1174, 1175-76 (1986) (en banc). That rule is moreover perfectly appropriate and sensible: the date on which the judgment is entered marks the point at which the right to attorney's fees arises; from that date forward, until the losing party pays the fees, he has the benefit of the funds and should pay interest until the date on which he finally pays the fees.

In this case, there can be no serious dispute that petitioner's right to attorney's fees was established with the jury verdict in his favor – a jury verdict that respondent has already unsuccessfully appealed, see *Bernback* v. *Greco*, 69 Fed. Appx. 98, 105 (CA3 July 11, 2003), cert. denied, 540 U.S. 1185 (2004). The relevant question is whether some other event had to occur before the entitlement arose, and the

answer to that question is incontestably "no." The question is not whether, by happenstance, the district judge only later considered the question and announced the conclusion that attorney's fees were owed.

In this case, the contract between petitioner and respondent expressly provided that "if any action at law or equity is brought to enforce or interpret this Agreement, the prevailing party therein shall be entitled to recover from the other party the actual attorney's fees incurred, court costs, and other litigation-related expenses," see 69 Fed. Appx. at 105; a second contract between petitioner and respondent "provided for attorney's fees and costs in almost identical language," *ibid.* Hence, the jury verdict unquestionably established petitioner's right to attorney's fees, which under the majority rule in the circuits triggered his right to interest from that date forward.[1] The lower courts accordingly were right to regard petitioner's entitlement to attorney's fees as a result of the jury verdict in his favor as settled, and this Court would have no reason to revisit that question. See Pet. App. 1a-2a (describing issue as "whether interest on an award of attorneys fees and expenses accrues from the date of the original judgment on a jury verdict entitling a party to attorneys fee[s] and expenses"); *id.* 4a (noting that petitioner "seeks * * * interest from the day I determined the fees were due").

But in any event, and as petitioner has already explained, see Pet. 7 n.4, if the Court believed that some question about petitioner's entitlement to the fees nonetheless remained, such

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[1] Despite the clear language of the contracts, respondent attempts to cloud the issue by invoking a third fee provision: a separate agreement between petitioner and his counsel "providing that [petitioner's] attorney's fees are limited to 40% of the jury verdict," see 69 Fed. Appx. at 105. However, as is plain on its face, that separate agreement addressed only the *amount* of fees that petitioner's counsel would receive, and had no effect whatsoever on petitioner's *right* to receive fees.

a question could appropriately be resolved by the court of appeals on remand from this Court.

2. The fact that respondent may have disputed whether he was a party to the two contracts creating petitioner's right to attorney's fees and thus whether petitioner was a "prevailing party" entitled to fees, see BIO 3, is similarly irrelevant to the determination whether the jury verdict was a judgment that "unconditionally entitled" petitioner to attorney's fees. Even in cases involving awards of attorney's fees expressly provided for by statute, courts must after the entry of the initial money judgment determine whether the party seeking such fees is in fact a "prevailing party" and, if so, the extent to which that party is entitled to receive fees. See, *e.g.*, *Farrar* v. *Hobby*, 506 U.S. 103, 111-12 (1992) ("A plaintiff 'prevails' when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff."). Such determinations frequently require the court to engage in a complicated analysis of multiple claims. See, *e.g.*, *Koswenda* v. *Flossmoor Sch. Dist. No. 161*, 227 F. Supp. 2d 979, 994 (N.D. Ill. 2002) (concluding that plaintiff in administrative proceeding brought under the Individuals With Disabilities Education Act was "prevailing party" when he "received partial recovery on nine of twenty-one issues and items of requested relief, but not on [his] major claims," but reducing attorney's fees award in light of plaintiff's limited success). However, once a party is determined to be a "prevailing party" for purposes of entitlement to reasonable attorney's fees, that status runs from the date of the judgment in his favor, as it is that judgment – rather than the court's determination that he is indeed a prevailing party – which establishes his right to receive attorney's fees. See *supra* at 2; see also, *e.g.*, *Drabik*, 250 F.3d at 493 ("[S]ince the district court's judgment has been upheld on appeal, [appellant] has been, since entry of judgment on the merits, entitled to its reasonable attorney fees.").

3. To the extent that respondent is somehow arguing that, for purposes of Section 1961(a), an unconditional entitlement to attorney's fees can arise only from a statute or a rule, he is equally mistaken. To the contrary, nothing in the statute supports such an argument. See 28 U.S.C. 1961(a) ("Interest shall be allowed on any money judgment in a civil case recovered in a district court. * * * Such interest shall be calculated from the date of the entry of the judgment * * *."). Respondent's assertion is accordingly belied by the opinions of the courts confronting the question presented. See, *e.g.*, *Drabik*, 250 F.3d at 485 ("We now turn to the following issue: Whether an award of attorney fees accrues interest, pursuant to 28 U.S.C. § 1961, from the date of the judgment that unconditionally entitles the prevailing party to reasonable attorney fees, or the date of the judgment quantifying that fee award."); *Friend* v. *Kolodzieczak*, 72 F.3d 1386, 1391-92 (CA9 1995) ("Interest runs from the date that entitlement to fees is secured, rather than from the date that the exact quantity of fees is set."), cert. denied, 516 U.S. 1146 (1996); *Mathis* v. *Spears*, 857 F.2d 749, 760 (CAFC 1988) ("Interest on an attorney fee award * * * runs from the date of the judgment establishing the right to the award, not the date of the judgment establishing its quantum.").

Because this question presented easily satisfies all of the criteria for granting certiorari, and because this case presents an ideal vehicle for resolving that question, certiorari should be granted.

CONCLUSION

For the foregoing reasons, as well as those set forth in the petition, certiorari should be granted.

Respectfully submitted,

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